

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID VELASQUEZ,
CDCR #D-75915,

Plaintiff,

vs.

A. BARRIOS, C. GREY, C. ROBERTSON,
M. LEVIN, F. PASCUA, R. TORREZ,
GONZALES, FLINT, S. THOMAS, C.
HALL, N. GRANNIS; and L.E.
SCRIBNER,

Defendants.

Civil No. 07c v1130 LAB (CAB)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL FILING
FEE, GARNISHING BALANCE
FROM PRISONER'S TRUST
ACCOUNT [Doc. No. 2];**

AND

**(2) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE PURSUANT TO
FED.R.CIV.P. 4(c)(2) AND
28 U.S.C. § 1915(d)**

Plaintiff, an inmate currently incarcerated at Pelican Bay State Prison in Crescent City, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983.¹ Plaintiff alleges that, while he was incarcerated at Calipatria State Prison ("CAL"), CAL prison officials failed to provide him with adequate medical care in violation of his Eighth

¹ The proceedings were assigned to this Court, but have been referred to Magistrate Judge Cathy Ann Bencivengo by Local Rule 72.3(e), "Assignment of § 1983 Prisoner Civil Cases to United States Magistrate Judges," pursuant to 28 U.S.C. § 636.

1 Amendment rights when they failed to provide adequate pain medication and delayed surgery
 2 for his hernia condition for over sixteen months.

3 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead,
 4 he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)
 5 [Doc. No. 2].

6 **I. Motion to Proceed IFP [Doc. No. 2]**

7 All parties instituting any civil action, suit or proceeding in a district court of the United
 8 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 9 U.S.C. § 1914(a). An action may proceed despite a party’s failure to prepay the entire fee only
 10 if that party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
 11 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,
 12 remain obligated to pay the entire fee in installments, regardless of whether their action is
 13 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
 14 (9th Cir. 2002).

15 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
 16 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
 17 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement indicates
 18 that he has insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C.
 19 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil
 20 action or appealing a civil action or criminal judgment for the reason that the prisoner has no
 21 assets and no means by which to pay the initial partial filing fee.”). Therefore, the Court
 22 **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and assesses no initial partial filing
 23 fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated
 24 shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment
 25 provisions set forth in 28 U.S.C. § 1915(b)(1).

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1 **II. Sua Sponte Screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A**

2 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 3 IFP and those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,
 4 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions
 5 of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after
 6 docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must
 7 sua sponte dismiss prisoner and all other IFP complaints, or any portions thereof, which are
 8 frivolous, malicious, fail to state a claim, or which seek damages from defendants who are
 9 immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27
 10 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
 11 (§ 1915A).

12 Here, the Court finds that Plaintiff’s allegations that Defendants were deliberate
 13 indifferent to a serious medical need, if presumed true as they must at this stage of review, are
 14 sufficient to survive the initial screening provisions of 28 U.S.C. §§ 1915(e)(2) and 1915A(b).
 15 *Lopez*, 203 F.3d at 1126-27 (9th Cir. 2000) (“The language of section 1915(e)(2), as it applies
 16 to dismissals for failure to state a claim, ‘parallels the language of Federal Rule of Civil
 17 Procedure 12(b)(6).’”) quoting *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998);
 18 *Resnick*, 200 F.3d at 644 (when conducting sua sponte screening pursuant to 28 U.S.C. § 1915,
 19 court must construe pro se pleadings liberally). However, Plaintiff is cautioned that “the sua
 20 sponte screening and dismissal procedure is cumulative of, and not a substitute for, any
 21 subsequent Rule 12(b)(6) motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*,
 22 481 F.Supp.2d 1115, 1119 (S.D. Cal. 2007).

23 **III. Conclusion and Order**

24 Good cause appearing, **IT IS HEREBY ORDERED** that:

25 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
 26 is **GRANTED**.

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1 2. The Secretary of California Department of Corrections and Rehabilitation, or his
2 designee, is ordered to collect from Plaintiff's prison trust account the \$350 balance of the filing
3 fee owed in this case by collecting monthly payments from the trust account in an amount equal
4 to twenty percent (20%) of the preceding month's income credited to the account and forward
5 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
6 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
7 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

8 3. The Clerk of the Court is directed to serve a copy of this order on James Tilton,
9 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,
10 Sacramento, California 94283-0001.

11 **IT IS FURTHER ORDERED** that:

12 4. The Clerk shall issue the summons, provide Plaintiff with a certified copy of both
13 this Order and his Complaint, and forward them to Plaintiff along with a blank U.S. Marshal
14 Form 285 for each Defendant named in his Complaint. Plaintiff shall complete the Form 285s
15 and forward them to the United States Marshal. The U.S. Marshal shall then serve a copy of the
16 Complaint and summons upon Defendants as directed by Plaintiff on each U.S. Marshal Form
17 285. All costs of service shall be advanced by the United States. *See* 28 U.S.C. § 1915(d);
18 FED.R.CIV.P. 4(c)(2).

19 5. Defendants are thereafter **ORDERED** to reply to the Complaint within the time
20 provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42 U.S.C.
21 § 1997e(g)(2) (while Defendants may occasionally be permitted to "waive the right to reply to
22 any action brought by a prisoner confined in any jail, prison, or other correctional facility under
23 section 1983," once the Court has conducted its *sua sponte* screening pursuant to 28 U.S.C.
24 § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on the face
25 on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the merits,"
26 Defendants are required to respond).

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1 6. Plaintiff shall serve upon Defendants or, if appearance has been entered by
2 counsel, upon Defendants' counsel, a copy of every further pleading or other document
3 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
4 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
5 of any document was served on Defendants, or counsel for Defendants, and the date of service.
6 Any paper received by the Court which has not been filed with the Clerk or which fails to
7 include a Certificate of Service will be disregarded.

IT IS SO ORDERED.

9 || DATED: August 27, 2007

Larry A. Bunn

HONORABLE LARRY ALAN BURNS
United States District Judge